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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 721

DARLINGTON MANUFACTURING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

No. 722

DEERING MILLIKEN, INC., AND DEERING MILLIKEN & CO., INC., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, AND TEXTILE WORKERS UNION OF AMERICA, AFL-CIO

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, sitting *en banc,* is reported at 397 F. 2d 760 (Pet. App. 5a–50a). The Board's initial decision and order (J.A. 1–42) [1] and its

[1] "J.A." refers to the portions of the record printed as a joint appendix to the briefs in the court of appeals.

supplemental decision on remand (Pet. App. 41a–84a) are reported at 139 NLRB 241 and 165 NLRB No. 100, respectively.

JURISDICTION

The decree of the court of appeals was entered on May 31, 1968 (Pet. App. 1a–2a), and a petition for rehearing *en banc* was denied on August 29, 1968 (Pet. App. 3a–4a). The petitions for writs of certiorari were filed on November 8, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the finding of the National Labor Relations Board that the Darlington mill, one of several mills owned and controlled by Deering Milliken,[2] was closed for a purpose of discouraging unionism among employees in the other mills of the Deering Milliken enterprise.

2. Whether the Board properly concluded that it was realistically foreseeable that the employees at the other Deering Milliken mills would fear that their mills would also be closed if they engaged in union organizational activities.

3. Whether the Board's reliance on an internal management memorandum and speeches made by the company president was barred by Section 8(c) of the Act.

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[2] The court of appeals held that there was substantial evidence to support the Board's finding that Darlington and Deering Milliken constituted a single employer for purposes of the Act (Pet. App. 14a), and that finding is not challenged here (Pet. in No. 722, n. 5, pp. 5–6).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at p. 85a in the Appendix to the petitions.

STATEMENT

A. THE PRIOR PROCEEDINGS

In its initial decision herein (139 NLRB 241; J.A. 1–42), the Board found that Darlington Manufacturing Company had violated Section 8 (a) (1), (3), and (5) of the Act by the retaliatory closing of its textile plant in Darlington, South Carolina, after the employees, in a Board-conducted election, had chosen the Textile Workers Union of America, AFL–CIO as their bargaining representative. The Board also found, *inter alia,* that Darlington had violated Section 8(a)(1) prior to the election by threatening the employees that the plant would be closed down if they chose union representation, telling them that it had been closed for this reason, threatening that union adherents would be blacklisted, supporting a petition disavowing the Union, and coercively interrogating employees. (J.A. 6–7, 18–19.) In addition, the Board found that there was a sufficient degree of common ownership and common control over labor relations and operations to make Darlington, Deering Milliken & Co., Inc., its successor in interest Deering Milliken, Inc., and their other affiliated mill corporations a single employer under the Act. Consequently, the Board held that Deering Milliken was responsible, along with Darlington, for remedying the

unfair labor practices (J.A. 19–30). The Board's order, *inter alia,* directed Deering Milliken to reimburse the discharged employees for wages lost from the time of discharge until they were offered reinstatement or placed on preferential hiring lists at other Deering Milliken mills, to bargain with the Union about reemployment procedures, and to publish and mail to the employees appropriate notices (J.A. 19–33). (No question as to the propriety of the remedial provisions of the Board's order is raised in the petitions.)

The court of appeals, sitting *en banc,* denied enforcement of the Board's order, by a 3–2 vote (325 F. 2d 682). The majority of the court held that the decision to close the Darlington plant was not an unfair labor practice because an employer has the "absolute prerogative" to "go out of business in toto or to discontinue it in part permanently at any time," even if this action is "spurred by unionization" (325 F. 2d at 685–686).

Upon review, this Court agreed that "an employer has the absolute right to terminate his entire business for any reason he pleases," but disagreed "with the Court of Appeals that such right includes the ability to close part of a business no matter what the reason" (380 U.S. at 268). Noting that "a discriminatory partial closing may have repercussions on what remains of the business, affording employer leverage for discouraging the free exercise of § 7 rights among remaining employees," (*id.* at 274–275) the Court held that a

> partial closing is an unfair labor practice under § 8(a)(3) if motivated by a purpose to chill

> unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing would likely have that effect.
>
> * * * * *
>
> If the persons exercising control over a plant that is being closed for antiunion reasons (1) have an interest in another business, whether or not affiliated with or engaged in the same line of commercial activity as the closed plant, of sufficient substantiality to give promise of their reaping a benefit from the discouragement of unionization in that business; (2) act to close their plant with the purpose of producing such a result; and (3) occupy a relationship to the other business which makes it realistically foreseeable that its employees will fear that such business will also be closed down if they persist in organizational activities, we think that an unfair labor practice has been made out. [*Id.* at 275–276.]

"Although the Board's single employer finding necessarily embraced findings as to Roger Milliken and the Milliken family which, if sustained * * *, would satisfy the elements of 'interest' and 'relationship' * * *," the Court concluded that "the Board's findings as to the purpose and foreseeable effect of the Darlington closing pertained *only* to its impact on the Darlington employees" (*id.* at 276). Accordingly, it remanded the proceedings "to afford the Board the opportunity to make further findings on the issue of purpose and effect" (*id.* at 277).

B. THE BOARD'S FINDINGS OF FACT ON REMAND

1. THE PERSONS EXERCISING CONTROL OVER DARLINGTON AND THEIR RELATED BUSINESS INTERESTS

The Darlington mill was the only mill owned by the Darlington Manufacturing Company, a South Carolina corporation. Darlington Manufacturing Co. was one of 17 corporations, operating 27 textile mills, controlled by the Milliken family (Pet. App. 51a–53a, 8a–14a; J.A. 2080–2081, 2085–2087, 23–27). The Milliken family owned a majority of the stock in Deering Milliken & Co. and in Cotwool Manufacturing Company.[3] Through direct stock ownership and the stock held by these two companies the family owned more than 66 percent of Darlington's stock (J.A. 23–24, 234–236, 1292–1300, 1308–1311). Deering Milliken & Co. was the exclusive sales agent and factor for all 27 mills (J.A. 110–111, 1237–1239, 2200–2201). The directors of Deering Milliken & Co.[4] comprised a majority of the directors of Darlington and all but one of the other mill corporations (J.A. 24, 520–521, 1308–1311, 1322). One attorney, J. D. Poag, advised all mills on labor relations (J.A. 2457, 2806, 2812–2815, 2817–2823, 2825, 2827–2836, 3412, 3421), and the different units were operated as one in many other

[3] In 1960, after the commission of the unfair labor practices found by the Board, Deering Milliken & Co. and Cotwool merged and formed Deering Milliken, Inc. In the process, several of Cotwool's former subsidiaries were absolved into Deering Milliken, Inc. (J.A. 1322, 1872–1873, 1884–1885, 2086).

[4] Roger Milliken, Gerrish H. Milliken, Jr. (his brother), Minot Milliken (his cousin), H. A. Hatch (his uncle), and Francis G. Kingsley.

significant respects (J.A. 25–26, 160–161, 174–175, 126, 118, 119, 158–159, 131, 140–148, 156).

Roger Milliken, the Board found (Pet. App. 68a, 47a), "held the obvious position of power in the corporate organization * * *"; he "was manifestly the appointed steward of the Milliken family interests * * *." He was president of Deering Milliken & Co., of Darlington, and of all the other mill corporations except one, where he served as vice president and a director (J.A. 24; 1322, 1341). He approved all capital expenditures for the mill corporations, taking into account the prospective return to the enterprise as a whole (J.A. 559–561, 741–744, 839, 990–994, 1053–1054, 1066–1067, 1083–1085, 1355, 1447–1448, 1501, 1687, 3509, 3510, 3524–3526, 3541, 3558–3562, 2198–2200). He received reports every four weeks from each mill showing, *inter alia,* the number of hours operated each week; man-hour savings achieved; planned or effected abolition of jobs or changes in job assignments; and changes in such working conditions as lighting, ventilation and humidity (J.A. 24, 145; 1694–1699, 1711–1713, 1797–1811, 1824–1859, 1002–1004, 1013–1020, 1033–1034, 1050–1051, 1069–1070, 1072–1073, 1106–1107, 1153–1162). He made detailed proposals and recommendations to his subordinates about such matters as the employment of quality control and engineering personnel; reduction of accidents; tagging machinery with its cost to discourage misuse; use of closed circuit television to eliminate certain jobs; and machinery arrangement to reduce operators' walking distances (J.A. 24; 1026,

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1047, 1048, 1061, 1073–1074, 1716–1718, 1730–1731, 1735, 1748–1761). His approval was sought before vacation plans were announced, before changes in the employees' group insurance programs were formulated, and before "spare hands" or substitute workers were eliminated (J.A. 1086–1089, 1773, 1409, 1757).

Finally, as shown *infra*, Roger Milliken determined and publicized the employer's policy toward unionization, and implemented that policy by effectuating the liquidation of Darlington immediately after its employees chose union representation. The Board found (J.A. 2091–2092) that "to Roger Milliken the Union victory at Darlington had substantial implications for the 26 other mills * * *"; it was "a portent of other union victories in the other [non-unionized] plants, if permitted to go unchallenged. * * *"

2. THE ANTI-UNION CAMPAIGN AT THE DARLINGTON MILL, AND THE CLOSING OF THAT MILL WHEN THE EMPLOYEES SELECT A UNION REPRESENTATIVE

In March 1956, the Union began an organizational campaign among the employees at the Darlington mill (J.A. 4, 2080; 250, 2159). Roger Milliken was promptly advised of this activity by mill treasurer (and director) Oeland (J.A. 2159). Milliken requested Attorney Poag to "spend time down there," and Poag thereupon took charge of the campaign in opposition to the drive (J.A. 421–422, 2841–2842). As the court of appeals stated (Pet. App. 13a): "In opposing union organization at Darlington, Poag reflected Milliken's policy for all mills, not just Darlington." Poag conducted approximately three to five

meetings with Darlington's supervisory personnel (including "overseers" and "second hands"), instructing them "how they were to talk to the people" (J.A. 2805, 2825–2827, 2839–2840, 3412–3413). According to mill treasurer Oeland, Poag told the supervisors that, although "Mr. Milliken had not said what he would do [if Darlington were organized], * * * other mills had closed down where Mr. Milliken had tried to operate with a union" (Pet. App. 16a, n. 17; J.A. 3405, 3412). As the court below noted: "The supervisors understood the message. The record discloses numerous instances in which they told employees that Milliken had closed other mills because of unionization and that he would do the same at Darlington" [5] (Pet. App. 16a; J.A. 4, 6-7, 25, 322–323, 325–327, 330–331, 334–339, 343–346, 350, 354–357, 361–363, 366, 370, 384).

On September 6, 1956, the Union won a Board-conducted election by a narrow margin (J.A. 4; 250–251). Immediately thereafter, both Oeland and Poag so informed Roger Milliken by telephone (J.A. 279). On the following day, Roger Milliken decided to recommend that Darlington be shut down (J.A. 4, 263, 1092). He testified (J.A. 457, 422–423, 464, 472, 476–477) and Darlington conceded before the Board (J.A. 8, n. 15), that the election results played a substantial part in the decision to close the mill. As Roger Milli-

[5] At the same time, management posted on the plant bulletin boards posters depicting a closed plant and containing, *inter alia*, the caption: "The records prove that the TWUA-CIO has caused many textile mills to close, ending jobs and bringing hunger and privation to people who want to work * * *" (J.A. 7, n. 13; 1255, 75–76).

ken put it (J.A. 457), "* * * the people in electing a union indicated an unwillingness to cooperate."

Roger Milliken called a special meeting of the Darlington board of directors for September 12, but advised only those directors who were members of his family that his intention was to close the mill (J.A. 57; 280–281, 424–426, 3105–3106).[6] The meeting, which also discussed a number of other matters, lasted only 75 minutes; the board unanimously approved a resolution to liquidate Darlington and to call a special meeting of the stockholders to approve the proposal (J.A. 5; 431, 1256–1261, 281–282, 448).[7]

Immediately afterwards, Oeland gave various Darlington supervisors "the words of Mr. Milliken and others regarding the reason for liquidation," and told them to advise their subordinates of the directors' rec-

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[6] Director Oeland explained (J.A. 3421–3422):

> * * * During the early part [of the directors' meeting], Mr. Milliken took me into a room to myself. * * * He told me he was going to suggest to the directors that they recommend * * * Darlington be liquidated * * *. I said, Mr. Milliken, actually there are a lot of people loyal to you at Darlington, as the vote would indicate. Do you think it is right not to give them a chance to see if we could operate the mill * * *. [Roger Milliken] said that the people had had that chance during the election * * *.

Directors Lyles and Nicholson were first told the purpose of the meeting after Oeland was taken "into a side room and talked to" by Roger Milliken (J.A. 3105–3106, 3457–3476).

[7] At no time during this brief meeting did the directors specifically ask what the Union's economic demands were (J.A. 3423, 460–461, 2706–2707, 2746–2747, 3464–3465); indeed, the Union had not made any specific demands (J.A. 460–461). As counsel for the employer conceded before the Board (J.A. 2714): "* * * We have no problem of what the Union was asking of management in this case."

ommendation (J.A. 491–492). In relaying Oeland's message, many supervisors attributed the closing of the mill to the Union's election victory, and to the decision of Roger Milliken (J.A. 5, n. 10, 6; 351–353, 327, 320, 359, 306, 309–311, 344, 357, 366–367, 370, 374, 380, 482, 3193–3201).[8] Oeland testified that the following "Bulletin," appearing in the September 13 edition of the Darlington News and Press, "correctly reflect[ed] what had happened" (J.A. 3424–3425, 3733):

> A meeting of stockholders of Darlington Manufacturing Company has been called for October 17 * * * to decide whether to close the local cotton mill or continue its operation. * * * The news and press was advised of the meeting early Wednesday afternoon via telephone conversation with James M. Oeland * * *. *It was reported that the Deering-Milliken textile chain has closed two or three mills which voted for union representation. Its only unionized plant, a unit in Maine, was recently shut down.* [Emphasis added.]

On October 17, 1956, Roger Milliken opened the stockholders' meeting with the statement "that on September 6, when [the employees] voted for a union * * * he decided to close the mill" (J.A. 5; 263, 292, 1262–1265). He then voted all the shares he held in person and by proxy—which included not only the 6 percent owned by him and his immediate family, but the 59 percent owned by Deering Milliken & Co. (41

[8] The supervisors stated, for example, "* * * I told you damn Union people if you all voted the Union in he would close the plant down. * * * Roger Milliken is not going to run a plant with the Union * * *" (J.A. 351–352).

percent) and Cotwool (18 percent)—in favor of liquidation (J.A. 1292–1300, 438, 494–495). When asked why he was closing the mill even though "83 percent of the people have signed a petition to go back to work whether they have a union or not", he replied, "As long as there are 17 percent of these hard core labor people here, I refuse to run the mill" (J.A. 5; 266, 268). He also issued a news release (prepared prior to the stockholders' meeting) which announced the decision to liquidate and the sale of the plant at auction "at the earliest possible opportunity * * *" (J.A. 454, 458, 1270–1271, 3312, 3317).

After the September 12 board of directors' meeting, Darlington refused to accept any new orders for textiles (J.A. 6; 282–283, 928, 933–934, 941–943, 950, 955–956, 1788–1789, 2263–2268). As the existing work ran out, the Darlington employees worked shorter and shorter hours, and were gradually discharged; the mill was finally closed in November, and its assets were sold piecemeal at public auction on December 12 and 13, 1956 (J.A. 6, 11, n. 22; 284–291).

3. THE DARLINGTON LIQUIDATION BECOMES AN "OBJECT LESSON" FOR THE REMAINING DEERING MILLIKEN EMPLOYEES

On November 14, 1956—one month prior to the piecemeal auction of Darlington—Roger Milliken forwarded to the treasurers of a number of Deering Milliken mills, and to certain officials and employees of the related Deering Service Corporation, the following (Pet. App. 59a–64a; J.A. 2094–2097, 2101, 3548–3556, 968–982; and see J.A. 2767–2768, 3633–3635): (1) copy of a news article excerpted from the South Carolina

State Chamber of Commerce "Newsletter" of October 1956; (2) reprint of an article and editorial which had appeared in the November 8, 1956 edition of *America's Textile Reporter,* a trade magazine; and (3) a covering memorandum by Milliken.

The "Newsletter" article stated, *inter alia,* that a Massachusetts mill executive had "notified the mill's 300 employees last week that the plant would be closed permanently" because, "since the signing of a labor contract last February, the union has kept the mill in a state of turmoil and reduced efficiency and production to the point that the owners were convinced the mill had no future and investment of further funds were not justified * * *" (J.A. 3555–3556). The *Textile Reporter* article bore the headline "Darlington Situation Becomes Object Lesson To All Concerned," and the subheadline "Present Stepped-Up Union Activity in South Harbinger of Stronger Efforts and More Exaggerated Promises to Come" (J.A. 3549–3554). It described the economic distress of the City of Darlington, and added that the employees who voted against the Union would have to "suffer" along with those who voted for it (J.A. 3552). The editorial accompanying this article stated, *inter alia* (J.A. 3554–3555):

> If the people of Darlington knew anything of the Deering Milliken record, they would know that management * * * has [not] intended to share the prerogatives of management with labor union leaders. This has been the case through three generations of Milliken opera-

> tions. When the Madison Woolen Mills of Madison, Maine, became not only unprofitable but unionized Mr. Gerrish Milliken liquidated it * * *. When the Dallas Manufacturing Co. at Huntsville, Alabama, became unionized, the Millikens liquidated it, contrary to the opinion of many local people that such would not be the case. We ourselves are small shareholders in Darlington and from experience and acquaintanceship, we knew the minute the union election vote was announced that we would receive a call for a special meeting to vote for liquidation.

The memorandum which Roger Milliken sent with the above enclosures told his mill executives (J.A. 3548–3549):

> * * * The unions are going to be making a tremendous drive all through this area, and there are few things that are more important to us than making sure that the leaders in your community understand and are sympathetic to what you are trying to do.[9]

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[9] Roger Milliken had voiced similar sentiments in two speeches which he made several months before the Union campaign at Darlington started (Pet. App. 53a–59a; J.A. 2088–2092, 3621–3633, 2650–2676). In the speeches, he indicated that he regarded anticipated union organizational drives as a threat to the Southern industrial community; gave numerous examples where employers, including Deering Milliken, had refused to build or maintain factories in areas with "organized unions"; cited the liquidations of "three [Deering Milliken] textile plants—two in Maine [*i.e.*, Madison and Lockwood mills] and one in Alabama [*i.e.*, Dallas Manufacturing Co.]", and, by comparison, observed: "* * * last week we bought a plant in Maine [*i.e.*, Amerotron]. It is not organized * * *" (*ibid.*). As we show *infra*, pp. 23–24, the Board looked "to Milliken's [two] speeches not simply as proof that he closed Darlington because of the Union (a settled

Roger Milliken also prepared news releases on the Darlington liquidation, for he wanted "to have newspapers running a story on the action of the stockholders * * *"[10] (J.A. 3309–3312, 3335–3337). His "office" received "copies of the various newspaper reports, newspaper stories concerning the proposed liquidation of Darlington" (J.A. 3335–3336, 3344–3346, 3358–3359). He maintained a scrapbook containing the newspaper clippings "that were sent to us or were extracted from newspapers during the period that the affairs of [Darlington] were in the papers" (J.A. 1091–1092, 982–983).

The hearing on remand revealed that Deering Milliken supervisory and non-supervisory personnel at the remaining plants were fully aware of the Darlington liquidation (J.A. 2113–2116). Thus the superintendent of Deering Milliken's Hartsville mill, located in a town 14 miles from Darlington and served by the same local newspapers (J.A. 2114), acknowledged that the Darlington organizational campaign was discussed by the "people" at the Hartsville mill, "before the election" and "after the election" (J.A. 2114; 3129–3130, 3138, 3139–3146). The Hartsville mill's treasurer attended the Darlington auction; and he read Roger Milliken's memorandum, enclosing, *inter alia*, the *Textile Reporter* article and the editorial set forth *supra*, p. 13 (J.A. 2114; 3203, 3204–3205, 3208, 3230–3233,

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matter, we believe), but as evidence of both his apprehension of an anticipated large-scale union campaign and of his belief that an industry-wide response was imperative * * *" (Pet. App. 59a).

[10] It was stipulated that there was "widespread publicity" attending the unionization and prompt liquidation of Darlington (J.A. 2800, 3092).

3241). He testified that the Darlington events "were common knowledge all over the plant"; that the Hartsville Chamber of Commerce, of which he was a member, had petitioned the employer not to close the Darlington mill; that the "thought probably occurred to" him that the Union might attempt to organize his mill, but, at that time, he had "no labor problems" like Darlington because his "people were very loyal" (J.A. 2114; 3230–3231, 3234, 3235–3236). Hartsville employee witnesses confirmed that Darlington was a constant subject of discussion at that mill (J.A. 2114; 2604–2614, 2616–2617, 3138–3142, 2408–2417, 2337–2343, and see, J.A. 2310–2329). As one former Hartsville employee explained: "there was talk about a union" (J.A. 2114); the subject of Darlington was frequently discussed among the employees from 1956 on (J.A. 2411–2412); "the discussions would be about organizing and helping the union's coming in and what would happen * * *" (J.A. 2114; 2411–2412). Conversations about Darlington between employees and supervisors were commonplace at the employer's other mills; such discussions included the warning that the other mills would be closed down, like Darlington, if they were organized (J.A. 2115; 2421–2424, 2425–2429, 2429–2434, 2917–2920, 2560–2574, 2579–2580, 2482–2486, 2495, 2512–2522, 2795–2799, 2864, 2866–2867, 3015, 2635–2638, 3611–3615).

C. THE BOARD'S CONCLUSIONS

The Board reaffirmed its earlier finding that Darlington, Deering Milliken, and the latter's other mill corporations all constituted a single employer for

purposes of the Act; it also found that the "'persons exercising control over' Darlington (*i.e.*, the Milliken family, as advised and influenced by Roger Milliken) had interests in other businesses 'of sufficient substantiality to give promise of their reaping a benefit from the discouragement of unionization' in those businesses" (Pet. App. 52a). Moreover ,the Board found that, "when Roger Milliken acted at Darlington, his concern transcended the fate of the Darlington mill alone, and encompassed as well the future of all the mills with which he was connected." It concluded that "the closing of Darlington was, at least in part, the product of a desire to discourage unionism among employees at other Deering Milliken mills" (Pet. App. 66a–67a).[11] Finally, the Board found that "the relationship of the persons closing Darlington to other businesses was such to make it realistically foreseeable that the employees of the latter would fear that their mills also would be closed if they engaged in organizational activity" (Pet App. 84a). Accordingly, the Board reaffirmed its prior order.[12]

D. THE DECISION OF THE COURT OF APPEALS

The court of appeals, sitting *en banc,* enforced the Board's order in full. The court held "that the evi-

[11] The Board, in its first decision, had found that "the decision to close the mill was not in fact based on economic factors," and "would not have been made but for the protected organizational activities" (Pet. App. 48a–50a; *supra*, p. 3).

[12] The trial examiner had made contrary findings on these issues, but the court of appeals concluded that they were "of insufficient force to destroy the substantiality of evidence upon which the Board's decision rests. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 493 (1951)." (Pet. App. 7a, n. 4.)

dence considered as a whole supports the Board's single employer finding, which in turn satisfies the elements of 'interest' and 'relationship,' " required by this Court's earlier decision (Pet. App. 14a). Moreover, the court held that there was sufficient evidentiary support for the Board's finding that, in closing Darlington, "the employer was actually motivated, at least in part, by a purpose to chill unionism in other Deering Milliken mills" (Pet. App. 25a). Finally, the court sustained the Board's finding that it was realistically foreseeable that employees of other Deering Milliken mills would fear that their mills would be closed if they engaged in similar organizational activity (Pet. App. 25a–29a).

ARGUMENT

The court of appeals correctly concluded that the Board properly applied the principles delineated in this Court's prior decision remanding the case, 380 U.S. 263, and that the Board's findings are supported by substantial evidence on the record as a whole. There is thus no occasion for further review.

1. Petitioner Deering Milliken contends (Pet. in No. 722, pp. 7–10) that the Board's unfair labor practice finding is vulnerable because the Board failed to find that the employer's purpose to chill unionism among its remaining employees was "the moving cause, a substantial cause, or the immediate cause" of the Darlington closing. This assertion, however, impermissibly melds the associated but distinct principles which this Court indicated to be applicable to this case on remand.

As this Court recognized, and the court of appeals found to be substantially supported in its review on remand, the Board found that anti-union animus rather than an economic motive was "the moving cause, a substantial cause or the immediate cause" of the Darlington closing. 380 U.S. at 267, Pet. App. 24a and n. 26. The requirement of such a holding is the most that can be ascribed to the cases which Deering Milliken cites in its petition (p. 9 and nn. 10-11); in each, the Board was required to distinguish between a purely economic motive—for example, discharge "for cause"—and a motive to damage the union. In the peculiar circumstances of the present case, however, this Court held that the finding of the latter motive did not suffice; for, if the employer were going out of business entirely, it did not matter what his anti-union purpose was. His purpose could become significant only if the closing were partial, for then the employer might expect and intend (in part) to achieve future benefits in combatting unionization. 380 U.S. at 273, n. 19.

Once it is decided that anti-union animus was the moving, substantial or immediate cause of a partial closing, and that the closing was "motivated by *a* purpose to chill unionism in any of the remaining plants" (*id.* at 275; emphasis added), there is no reason to require, further, that the latter purpose, rather than that of retaliation against the union, predominated. For a purely economic motive for the action has already been ruled out. Indeeed, this Court, like the court of appeals (Pet. App. at 24a), recognized that the two anti-union purposes were not mutually exclusive when

it noted that "the Board's findings as to the purpose and foreseeable effect of the Darlington closing pertained *only* to its impact on the Darlington employees. No findings were made as to the purpose and effect of the closings with respect to the employees in the other plants comprising the Deering Milliken group." It thus left open for consideration on remand "a showing of motivation which is aimed at achieving the prohibited effect." 380 U.S. at 276. There is no suggestion in this language that the Board had also to find, as petitioners suggest, that the motivation to "chill" was predominant *over the retaliatory motive—i.e.,* was the moving substantial, or immediate cause—in the case as a whole.[13] The Board, responding to this Court's suggested inquiry, found with the substantial record support detailed above that "such a chilling purpose, at least in part, lay behind the decision to close the Darlington Mill" (Pet. App. 53a–76a, 84a). As the court of appeals correctly held, "[it] was sufficient for the Board to find that the election of the union was a substantial cause of Darlington's closing and that the employer was actually motivated, at least

[13] Petitioners' contention is undercut by this Court's discussion of *National Labor Relations Board* v. *Savoy Laundry, Inc.*, 327 F. 2d 370 (C.A. 2) and *National Labor Relations Board* v. *Missouri Transit Co.*, 250 F. 2d 261 (C.A. 8) at p. 273, n. 19 of its *Darlington* opinion. In both cases, an employer had terminated a part of his operations; although it was clear that his purposes included the discouragement of union activity among his remaining employees, there was neither finding nor suggestion that that was his predominant purpose, overall.

in part, by a purpose to chill unionism in other Deering Milliken mills" (Pet. App. 24a–25a).

2. Petitioners further contend (Pet. in No. 721, pp. 11–12, 13–19; Pet. in No. 722, p. 2, n. 4) that the Board improperly relied upon the motive of a single Darlington officer and director, Roger Milliken, in finding an unlawful purpose. This contention rests on a premise—*i.e.*, "Roger Milliken alone did not exercise control over the closing of Darlington and the Board does not find that he did" (Pet. in No. 721, p. 15)—that is contrary to the Board's explicit findings and the evidence in the record. Thus, the Board found, and the evidence summarized in the Statement affords ample support for the finding, that: "[T]he critical purpose is the one which moved Roger Milliken. He held the obvious position of power in the corporate organization, he convened the [directors'] meeting, he offered the resolution, and he advised why the resolution should be accepted. The other [three] Millikens were only tangentially related to the manufacturing operation. Gerrish Milliken, brother to Roger Milliken, was involved in the sales section of Deering Milliken, and had been elected to the Darlington board an hour before he voted to recommend liquidation of the plant; Minot Milliken, Roger Milliken's cousin, was the New York-based treasurer of Deering Milliken, whose prior experience had been in the woolen sales end of the operation; Harold Hatch, an uncle by marriage of Roger Milliken, * * * was in semi-retirement in Connecticut. * * * . According to Milliken, the three local directors [Oeland, Nichol-

son, and Lyles] were not even told prior to September 12 what the purpose of the meeting was to be" (Pet. App. 68a–69a). In these circumstances, the court of appeals properly sustained the Board's reliance "on Milliken's motive," because the "record shows that Milliken interests controlled Darlington and that Roger Milliken occupied a dominant role in the management and control of these interests" (Pet. App. 23a).

3. Petitioner Deering Milliken errs in contending (Pet. in No. 722, pp. 10–12) that the Board was required to establish that the employees at the other Deering Milliken mills were in fact "chilled" by the Darlington closing. Although this Court stated that it was not sufficient "to argue that the Darlington closing necessarily had an adverse impact upon unionization in such other plants," it added: "We have heretofore observed that employer action which has a foreseeable consequence of discouraging concerted activities generally does not amount to a violation of § 8 (a)(3) in the absence of a showing of motivation which is aimed at achieving the prohibited effect" (380 U.S. at 276). As the court of appeals correctly understood, these statements, read together, require only that there be specific proof of "the employer's subjective motive, interest or purpose to chill unionism elsewhere—which has been shown" (Pet. App. 28a–29a); they do not require the Board to engage in a subjective probing of the minds of the employees at the other mills, a kind of inquiry heretofore deemed improper (see Pet. App. 29a, n. 33). All the Court's

opinion demanded on this point was a showing—which the Board made here—that it was "*realistically foreseeable* that * * * employees [in the other related business] will fear that such business will also be closed down if they persist in organizational activities" (380 U.S. at 276, emphasis added).

4. Finally, there is no merit to petitioner Deering Milliken's contention (Pet. in No. 722, pp. 12–16) that the Board's reliance upon Roger Milliken's November 14, 1956 memorandum with attachments (*supra,* p. 14) and his two earlier speeches (n. 9, *supra*) was contrary to Section 8(c) of the Act.[14] The former was received into evidence *without objection* early in the Board proceedings (J.A. 968–969). The Board, in its first decision, found that Roger Milliken "circulated [the] memorandum and editorial as a primer to the managers of the mills in combatting unionization" (J.A. 25).[15] On remand, the Board found that these materials showed the "direct relationship between the closing of Darlington and Milliken's serious concern with the union threat to all of

[14] Section 8(c) provides that "The expressing of any views, argument, or opinions * * * shall not constitute or be evidence of an unfair labor practice * * * if such expression contains no threat of reprisal or force or promise of benefit" (Pet. App. 85a).

[15] As shown *supra*, p. 14, the memorandum conveyed to the managers of Roger Milliken's other mills his concern that "the unions are going to be making a tremendous drive all through this area"; warned them of the Milliken reputation for closing unionized mills; and directed the managers to "make sure the leaders in your community understand and are sympathetic to what you are trying to do."

his textile mills" (Pet. App. 59a), and amounted to instructions to the other mill officials to advise community leaders "that the mill might no longer be in that community, if the employees chose to unionize" (Pet. App. 62a). In these circumstances, the court of appeals properly held that the memorandum and enclosures were not privileged "views, argument, or opinion" under Section 8(c) (Pet. App. 19a–20a).[16]

Similarly, the Board's reliance upon Roger Milliken's two published speeches was not improper. As the court below noted (Pet. App. 20a–21a), the "Board carefully limited its consideration of these speeches" to " 'clarify the scope and breadth of the antiunion considerations which led to the Darlington closing.' " Section 8(c) "did not prohibit the Board from considering the speeches for [these] purposes"; and, in any event, the "speeches revealed nothing of substance not shown by other evidence"—they "neither add to, nor detract from, the evidence necessary to support the Board's decision" (*ibid.*).

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[16] As Senator Taft explained, "in order to make clear the legislative intent" of Section 8(c) (2 Leg. Hist. of the Labor-Management Relations Act, 1947, p. 1541 (1948)): "this subsection * * * does not cover instructions, directions, or other statements which might be deemed admissions under ordinary rules of evidence * * * this section does not make incompetent, evidence which would ordinarily be deemed relevant and admissible in courts of law." The propriety of the Board's use of "noncoercive" statements to assess purpose, motive, or intent is well settled. See, *e.g.*, *Hendrix Mfg. Co.* v. *National Labor Relations Board*, 321 F. 2d 100, 103–104 (C.A. 5); *Int'l Union, United A., A. & A. Imp. Wkrs.* v. *National Labor Relations Board*, 363 F. 2d 702, 707 (C.A.D.C.), certiorari denied, 385 U.S. 973.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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